No. 12,592

IN THE

United States Court of Appeals

For the Ninth Circuit

LAWRENCE A. WHITE and ERMA R. WHITE,
Appellants,

vs.

CLARA M. EAGLESON,
Appellee.

Appeal from the District Court, Territory of Alaska, Third Division.

BRIEF FOR APPELLEE.

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JURISDICTIONAL STATEMENT.

The appellee accepts generally the Jurisdictional Statement of the appellants, with particular reference to the provisions of New Title 28 U.S.C., Sections 1291 and 1294.

STATEMENT OF THE CASE.

In general, the appellee concurs in the facts as stated in appellants' brief, as supplemented by the following material matters:

On July 7, 1948, the appellants Lawrence A. White and Erma R. White, partners, doing business in Anchorage, Alaska, as the "L W Chocolate Shop", entered into a contract with Clara M. Eagleson, appellee, a licensed real estate broker. (R 65-68.) This contract was labeled an "authorization to sell" and gave appellee the "exclusive sale or transfer" of the business then being operated by appellants. (R 66, 5.) The contract having expired, appellants granted an extension of the agreement until April 30, 1949, by endorsement on the face of the contract. (R 68.) The pertinent portions of this "Authorization to Sell" are as follows:

> "I, Lawrence A. White and Erma R. White, of Anchorage, Territory of Alaska, have this day given Clara M. Eagleson, licensed real estate broker, in and for the Territory of Alaska, the exclusive sale or transfer of real estate situated at: Anchorage, Alaska * * *
>
> "I hereby appoint and constitute Clara M. Eagleson as my lawful agent and authorize said agent to enter into written agreement for me and on my behalf and in my name, for the sale of said real estate for the agreed price of $45,000.00 * * *
>
> "In consideration of the services of said agent in making such sale, transfer, sending me a buyer, advertising, or being instrumental in any manner, whatever, in selling or transferring said property, I agree to pay said agent out of first payment a commission due on total sale price of 10% of $45,000.00 payable at the office of the said agent. Any change in the price or terms agreed to by me, or in case a sale is made by owner while this

agreement is in effect, shall work no forfeiture in the commission due said agent in sale or transfer of said property. Should a deposit secured by said agent be forfeited, one-half hereof may be retained by said agent and the balance shall be paid to me. The agent's share of any forfeited deposit, however, shall not exceed my commission.

"I hereby list said property exclusively with said agent for a period of 60 days. I agree to pay said agent the commission set forth in this agreement, if a sale is made within 60 days after the termination of this Authorization to Sell, to parties with whom said agent negotiated during the time of the Authorization to Sell." (R 5-7, 66-68.)

In furtherance of the objectives of the contract, appellee advertised the sale of the property extensivly, both in Alaska and in Seattle, expending $600.00 and $700.00 in advertising. (R 136-319.) Her office interviewed more than ten prospective purchasers, and conducted them through the establishment. (R 80-81, 139.)

Around the 10th of March, 1949, Herbert E. Pickering, who had been in business in Fairbanks, became associated with appellants in the business on an arrangement for trading services in return for learning the candy business. (R 168-169.) About the 1st of April, 1949, Pickering and appellants began to discuss the possibility that Pickering might purchase the business. (R 171.) According to their testimony, the appellants and Pickering had agreed upon all terms of the purchase, including the price,

manner of payment and incidental matters, within a few days. (R 172-175, 189, 195.) On April 21, 1949, Pickering and the appellant, Lawrence White went to the offices of their attorneys in Anchorage, gave the attorneys the details of the contract and told them to go ahead and draw it up. (R 177.) A few days later, Pickering and Lawrence White returned to the offices of the attorneys and read the contract over for corrections. (R 178.) Pickering testified that the papers were not signed at that time because the sale was "contingent upon my being able to raise the money", and "* * * above all, not until after the 1st of May * * * because it was my understanding through Mr. White that it would be unnecessary to deal with any agency after the last day of April". (R 171.)

Early in April, 1949, appellee learned that Pickering might be a likely prospect for the purchase of the business. Lawrence White told Carl Rentschler, employed by appellee as a dealer, that Pickering was a prospect but that he would not offer the desired price. Appellant suggested that Rentschler endeavor to stimulate Pickering's interest by bringing other prospects into the store in sufficient numbers to lead Pickering to believe that a sale was imminent. (R 70, 83-84, 160.) Rentschler testified, "and as I stated before, he suggested that were I to get a prospect who would be made to appear very interested in the purchase it might persuade or coerce Mr. Pickering into coming up the additional amount of money that was desired by Mr. White". (R 84.) Thereafter,

Rentschler conducted several prospects through the establishment, at least one of whom was seen by Pickering. (R 83, 170.)

At the same time, appellants specifically instructed both Rentschler and appellee not to attempt to deal with Pickering in any way. (R 71, 73, 80, 141, 153.) As appellee testified, "I said let me talk to Mr. Pickering and let me see if we can include (induce) him to commit himself to a price that will allow for the commission which I agreed to take to help the deal out, and Mr. White replied, 'No, no, no, Pickering won't have anything to do with an agent. He is allergic to them' ". (R 141.) Or as Rentschler put it, "I was told by Mr. White that Mr. Pickering has a definite aversion to real estate agents and that I should not attempt to contact him in any way." (R 71.)

Around April 20, 1949, Rentschler had a conversation with appellant Lawrence White during which Rentschler stated that he had heard that White had sold the business. White denied that any sale had then been made. (R 74, 90.) On April 23, White had a conference with appellee at her office. White again denied that any sale had been made and asserted that "it was peculiar that people know more about my business than I do". (R 140.) White told appellee, "that he had such a low bid from Mr. Pickering that he just couldn't pay a commission and accept the offer." (R 141.) According to appellee, appellant admitted that he had made the deal to sell to Pickering, that the papers were all prepared, and they were

only waiting for the listing to expire. (R 156-157.) In late April, appellant told Wendell Dayton, a former employe, that he was selling the place to Pickering. (R 98-109.) At about the same time, appellant, in a conversation with Oliver J. Easley, admitted that he "was selling" or had "sold" the business to Pickering. (R 124, 127.) This conversation took place at the Alaska Freight Depot, and White said he was just down there picking up some machinery and "helping out the new owner temporarily until he got acquainted with the business". (R 124.) White categorically denied both these conversations. (R 186, 187.)

According to the contract between appellants and Pickering, Pickering was given possession of the property on May 1, 1949, and the contract was notarized and executed on May 2, 1949. (R 113, 117, 120-121.) Appellant refused to pay the commission on the sale demanded by appellee, and this suit followed. (R 74, 3-7.)

SUMMARY OF ARGUMENT.

I. Under the terms of her contract with appellants, the appellee was entitled to be paid her commission on the sale of the business. The contract was unambiguous, and there was ample evidence to support the verdict of the jury.

II. The court was correct in denying appellants' motion for judgment on the pleadings, or "summary judgment". The answers contained no new matter re-

quiring a reply, even under the Alaska Code. The Federal Rules of Civil Procedure, governing the trial, obviated any possible necessity for a reply.

III. There was no variance between the pleadings and the proof, as alleged by appellants. All were fully and fairly tried, and appellants were neither surprised nor misled.

IV. The court accurately and correctly instructed the jury on the law of the case, and the instructions as a whole, fully and fairly presented the issues to the jury.

ARGUMENT.

UNDER THE TERMS OF HER CONTRACT WITH APPELLANTS, APPELLEE WAS ENTITLED TO HER COMMISSION. THERE WAS AMPLE EVIDENCE TO SUPPORT THE VERDICT OF A JURY.

Counsel for appellants contends that appellee "offered no proof at all that she had procured Pickering to purchase the property * * * Neither is there any evidence that plaintiff procured the purchaser or was instrumental in any way in promoting the sale". Appellants' Brief, 20-21. This is the burden of appellants' argument in support of Points 2, 3, 5, 7, and 8 of their "Summary of Argument".

A. Points 2, 3 and 7 of the appellants' argument relate to the failure of the trial court to grant various motions for judgment, for directed verdict and for judgment notwithstanding the verdict, made by the defendants. We will first discuss these points.

We submit that appellants, throughout their arguments, have attempted to ignore and minimize the

special features of the "Authorization to Sell" involved in this case. This is not an ordinary "listing", or appointment of a broker as agent to sell. It is a special contract, creating what the great majority of courts have termed an "exclusive sale" or "exclusive right to sell". This distinction is of considerable importance in considering the right of the broker to her commissions, and is supported by ample judicial authority.

Generally speaking, if property is merely placed in a broker's hands for sale, or the broker is given a mere right to sell, the owner himself may make a sale without liability to the broker for commissions, provided the broker has not done the work required to earn his commissions (i.e., procured a buyer), and the owner's sale does not directly interfere with his efforts or appropriate the fruits of his labors. See, *Annotations,* 10 A.L.R. 814; 20 A.L.R. 1268. Thus, for example, in *Peters v. Ruebenhagen* (Minn. 1921) 184 N.W. 16, the defendants had merely listed their property with plaintiff and authorized him to procure a purchaser for it, agreeing to pay him a commission, if successful. Before he had obtained a buyer, they sold the property themselves. The court noted that, "there was, in fact, no exclusive right of sale in plaintiff, and defendants were at liberty to make a sale to anyone who might come forward with an offer to buy". 184 N.W. 16, at 17.

An "Exclusive agency" affords the broker little more protection; the owner may not dispose of the property through other brokers, but may still sell

the property himself without any liability to his broker. Thus, in *Donahue v. Reiner Co.* (R.I. 1925) 127 Atl. 359, 360, the authorization to the broker stated, "You are hereby granted the *exclusive agency* for the sale * * * for a period of six months * * *" (emphasis supplied.) This, the court held, did not preclude the owner from selling to a buyer procured by his own efforts. And see, 9 C.J. "Brokers". Sec. 101, p. 622:

> "As a general rule a real estate broker who is given an exclusive right to sell property is entitled to a commission on any sale thereof made by the principal either independently or through the efforts of another broker within the time specified in the contract of employment, although the exclusive agent's efforts did not contribute toward the sale, as where the principal himself sells the property without the broker's aid. Where, however, the broker is given merely an exclusive agency, as distinguished from an exclusive right to sell, it merely precludes the principal from employing another broker, and does not preclude him from making a sale himself, without the broker's aid, and in such a case he will not be liable to the broker for commissions regardless of who makes the sale, or unless he sells through another broker."

The "Authorization to Sell" in the present case was clearly an "exclusive right to sell" or "exclusive sale". The contract gave the broker the "exclusive sale or transfer" in so many words; again, it provided that the property was listed "exclusively with said agent for a period of 60 days". (R 5-6.) It went

even further and specifically provided that a sale by the owner during the term "shall work no forfeiture in the commission due said agent * * *" (R 6.) No more specific language was available, or necessary. Under this agreement the broker was clearly entitled to her commission if a sale was made of the property, whether by the owner or anyone else, during the term of the contract.

In *Harris v. McPherson* (Conn. 1922) 115 Atl. 723, the contract, although shorter, was similar: "This is to certify that on this date I have given to Morton S. Harris the exclusive sale of my property, viz: * * * and do agree to pay the said Morton S. Harris 5% of the purchase price at transfer of deed". The owner then sold the property to a purchaser of his own procuring. The court found that this contract gave the broker the exclusive sale of the property, and affirmed a judgment for the broker for his commission. To the same effect are: *Hughes v. Bickley* (Ala. 1921) 89 So. 33 ("exclusive option or right to purchase or sell * * *"); *Greene v. Minn Billiard Co.* (Wisc. 1920) 176 N.W. 239 ("exclusive authority to sell"); *Confer Bros. v. Colbreath* (Minn. 1921) 183 N.W. 524 ("exclusive right to sell"); *Dickinson v. P. J. Hooker Co.* (Ohio 1926) 155 N.E. 573 ("exclusive right to sell"); *Claire v. Blackfoot Waterworks, Ltd.* (Ida. 1924) 228 Pac. 326 ("exclusive right to sell").

Was there a sale during the term of the contract? This question was fairly submitted to the jury by the instructions of the court (R 32), and we submit

that there was ample evidence in the record to support a finding by the jury that a sale had actually been made during the term of the authorization, the formal execution of the sales contract being postponed to May 1 in order to avoid the payment of a commission. White and Pickering practically admitted as much. (R 157, 171, 175-6, 198.) They had prepared the contract of sale and deed, gone over it, and left it to be signed on May 1, with the express purpose of avoiding the payment of a commission. (R 171.) In this respect the case is remarkably similar to that of *Mercantile Trust Co. v. Lamar* (Mo. 1910) 128 S.W. 20, where the evidence disclosed that an agent of the broker had mentioned the listed property to the man who subsequently became the purchaser. Before the listing had expired this prospect told the agent that he had bought a home but was not at liberty to disclose what house it was until a later date. The owner admitted the sale of the property but said he purposely did not sell it until the day after the expiration of the listing period so that he would not have to pay the broker a commission. The owner introduced into evidence a written agreement to sell dated the day after the expiration of the listing and a deed dated the same day. There was evidence that the abstract of title had been ordered a few days earlier. The court held that whether or not there had been such a sale as would entitle the broker to his commission was a question which should be submitted to the jury. The court said:

> "* * * Neither do we accede to the proposition that if defendant had entered into a definite

> agreement with Reinberger by which defendant agreed to sell the property to the latter and his wife, and they agreed to buy it, this was not a sale which would entitle plaintiff to his commission because not evidenced by an instrument in writing. If such an agreement was made prior to the termination of plaintiff's agency on May 29, and the execution of a deed was deferred merely for the purpose of evading liability to plaintiff for a commission, the contract of sale was so far effective as to entitle plaintiff to a verdict * * * The instrument by which plaintiff was appointed agent would be defeated in one of its main provisions if a complete agreement might have been reached by defendant and the Reinbergers, and yet liability to plaintiff be avoided by postponing the formal consummation of a sale until its agency expired. Such an interpretation would relieve defendant from the duty to observe good faith in keeping the agreement with plaintiff." But see, *Lewis v. Dahl* (Utah 1945) 161 P.(2d) 362.

B. There having been a sale, within the meaning of the law, prior to May 1, the appellee was entitled to her commission under the terms of the authorization. As noted by appellant in his brief (p. 21), the broker was to receive a commission for her services, "in making such sale, transfer, sending me a buyer, *advertising or being instrumental in any manner whatever* in selling or transferring said property, * * *" (R 6, emphasis supplied.) There was no denial of the fact that appellee advertised the property extensively throughout the period of her agency. (R 136-7, 139.) The advertising was productive; more

than 10 prospects were interviewed and conducted through the premises. Such services and advertising are ample consideration for the payment of commissions under such a contract; there is no lacking element of "mutuality". *Krause v. Ferber* (N.J. 1918) 103 Atl. 409; *Kimmell v. Skelly* (Calif. 1900) 62 Pac. 1067; *Genske v. Christiensen* (Wis. 1926) 208 N.W. 467; *Harris v. McPherson,* supra; *Hughes v. Bickley,* supra; *Greene v. Minn Billiard Co.,* supra.

And, further, there was ample evidence from which the jury might conclude that the efforts of appellee and her associate, Rentschler, had been "instrumental" in promoting the purchase of the property by Pickering. "There is more than one way to skin a cat." (Old Saying.) Appellant Lawrence White himself had solicited appellee and Rentschler to bring "interested buyers" into the place of business during April in order that Pickering "might think the property were being sold out from under him". (R 70, 83-84, 160.) Rentschler cooperated with appellant in this scheme, marching three prospects through the establishment. (R 83.) From what appellant later told appellee, this effort was evidently successful in getting Pickering to raise his price from $30,000 to $35,000. (R 141, 154, 161.) The jury might well have determined that such indirect methods, used by the appellee, had been "instrumental" in persuading Pickering to close the deal with appellants. In *Bethel v. Preston* (Wash. 1930) 290 Pac. 224, the question was whether the broker had "produced" the ultimate purchaser. The broker had not dealt with the pur-

chaser directly, but instead had worked hard on other prospects, feeling that the purchaser would buy to protect his own interest at such point as it might appear that someone else was about to close a deal. The owner was aware of the broker's plan, and when it succeeded, sold to the purchaser without the broker's knowledge. The court said:

> "* * * but whether the agency was exclusive or not, neither Patterson nor the respondent, when they had well known for seven or eight months that Mr. Miller was the broker's principal objective and that he (the broker) with respondent's consent and approval was working upon Miller by indirect methods, had any right, as soon as Miller began to show the promised interest, to disregard what had been done and assume because appellant had not actually talked price and terms to Miller that therefore appellant had not produced him as a purchaser." 290 Pac. 224, at 225.

So, in the present case, appellants cannot ignore the efforts of appellee in "boosting" Pickering, successfully performed at appellants' request.

C. Appellants argue at some length that the "Authorization to Sell" contains inconsistencies and ambiguities and must therefore be construed against the appellee as the person responsible for it. (Appellants' Brief 29-33.) We submit that the authorization is clear and unambiguous, and was easily understood by the parties, the trial court and the jury. Appellants quite obviously understood that they were liable for the payment of a commission if a sale took

place to anyone prior to May 1, whether the purchaser was obtained by the appellee or not. On cross-examination, appellant, Lawrence White, testified, "I told Mrs. Eagleson that she had the exclusive on it until April 30th and I would not sell to anyone". (R 198.) He and Pickering postponed signing the papers when they were ready and corrected, until the day after the agency terminated because "it would be unnecessary to deal with any agency after the last day of April". (R 171.) Appellant further understood that his right to sell without payment of a commission was subject to the "60 day" clause:

> "Q. Mr. White, you understood, did you not, that this contract covered a sale made during a period of 60 days after the termination of the contract if such a sale was made to any person with whom the agent, Mrs. Eagleson, had dealt?
> "A. Yes, sir." (R 192.)

Appellants *may* have entered into a bad bargain when they signed this contract. They evidently did not think it too bad, as at one time they recognized the value of appellee's services and offered to pay her $2,000 on account of her work. (R 141, 155-6.) Be that as it may, the mere fact that parties have made an improvident or imprudent bargain will not lead a court to make unnatural implications or artificial interpretations or write a new contract for the parties. Williston, *Contracts,* Sec. 620 (Rev. Ed.). For a pertinent example, see *Turner v. Baker* (Pa. 1909) 74 Atl. 172, 173:

> "It is true in some of our cases, where the parties had executed a contract in which it was ex-

> pressly covenanted that the brokers should be paid a stipulated commission in the event of a sale within the time specified, no matter whether it was effected by the broker or by the principal, or by any other person, it was held that the commission could be recovered when the sale was made, and that it was immaterial who made it. These cases announce no new rule of law. They are simply declaratory of a fundamental maxim, which is that parties are bound by the terms of their own contract. If an owner of real estate chooses to make a contract with a broker, in which it is stipulated that the broker shall have the exclusive right to sell the property within a specified time, and that he shall be entitled to receive a certain commission if a sale be made within the time designated, no matter who makes it, he is bound by its terms, and cannot be relieved from a bad bargain because his agreement may have been foolish or improvident."

This language might well be applied to the contract in the present case.

THE COURT WAS CORRECT IN DENYING APPELLANTS' MOTION FOR JUDGMENT ON THE PLEADINGS, OR "SUMMARY JUDGMENT". THE ANSWERS CONTAINED NO NEW MATTER REQUIRING A REPLY, EVEN UNDER THE ALASKA CODE. THE FEDERAL RULES OF CIVIL PROCEDURE, GOVERNING THE TRIAL AND THIS APPEAL, OBVIATE ANY POSSIBLE NECESSITY FOR A REPLY.

Appellants contend that the answers contained new matter to which appellee was required to reply under the provisions of the Alaska Code of Civil Proce-

dure. They contend that the trial court erroneously denied appellants' motion for judgment on the pleadings or "summary judgment". That motion was grounded upon appellants' failure to reply to the so-called new matter and upon the testimony of appellee's first witness.* The appellants contend that the Alaska Code should have been applied to the motion.

A. The Alaska Code of Civil Procedure requires that when an answer contains "new matter", the failure to reply is available on a motion for judgment on the pleadings. The Federal Rules of Civil Procedure became applicable in the District Court for the District of Alaska before the time of the trial of the case and the trial court applied these rules to the motion. Rule 86 of the Rules provides:

> "They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work an injustice, in which event the former procedure applies."

Thus, under the rule, a former procedure governs only where to apply the Federal Rules of Civil Procedure would not be feasible or would work injustice. And, before applying a former procedure, the

*The trial court correctly disregarded this testimony because only the pleadings should be considered upon motion for judgment on the pleadings. *Daggs v. Phoenix National Bank*, 177 U.S. 549 (1900).

trial court must find that to do otherwise would be unjust. *John R. Alley & Co., Inc. v. Federal National Bank* (CCA 10th, 1942) 124 F.(2d) 995; *Automobile Insurance Co. v. Springfield Dyeing Co., Inc.* (CCA 3rd, 1939) 106 F.(2d) 204. In the first cited of those two cases, the court at page 999 said:

> "The purpose is evident in the new rules to extend their application, unless for good cause shown, to all proceedings, whether brought prior to their effective date or thereafter. It has been held that the trial court must *specifically find* that the application of the new rules would be unjust in order for one complaining of their application to raise the question on appeal." (Emphasis supplied.)

In the present case, appellants did not even attempt to show that to apply the Federal Rules would be unjust.

B. Assuming, arguendo, that the trial court improperly exercised its discretion and that the Alaska Code of Civil Procedure should govern, the answers did not, in fact, contain any new matter. In the complaint (R 3-7) it was alleged that plaintiff and defendants had entered into a contract according to the terms of which plaintiff was employed to procure a buyer for a certain business, that the contract was in force until the 30th of April, 1949, that during April, 1949, plaintiff was instrumental in obtaining a buyer, and that in April, 1949, defendants sold the business. The contract itself was by reference made an exhibit to the complaint. (R 5-7.) The answers

(R 7-12) contained denials of the allegations contained in the complaint and also alleged that the contract expired before the sale, that the plaintiff was not instrumental in interesting the buyer, and that the sale was made between the buyer and sellers after the contract had expired and without plaintiff's assistance. Those allegations in the answer were purely evidentiary and argumentative and created no new issues. Thus, evidence to support the allegation of the answers that the contract *had expired before the sale* would be admissible under the issues framed by the allegations of the complaint that the contract *did not expire until April 30* and *that the sale was in April,* and the denial of those allegations by the answer. Similarly, evidence to support the allegation that the plaintiff was *not* instrumental in interesting the buyer would be admissible under the issue of fact framed by a denial of the allegation of the complaint that plaintiff *was* instrumental in procuring a buyer. And, similarly, evidence to support the allegation that the sale was made by direct negotiations between the buyer and the sellers after the contract had expired and without any effort on behalf of plaintiff would be admissible under the issues framed by the denials of the complaint's allegations that the contract was in effect throughout April and that plaintiff was instrumental in procuring a buyer. For a similar pleading problem, see, *Hubbard, et ux. v. Olsen-Roe Transfer Co.,* 224 Pac. 636 (1924).

Furthermore, the matter was not new because it purported to show that the alleged claim never ex-

isted, rather than to admit its existence and defeat it. *Brown v. Jones,* 3 P.(2d) 768 (1931).

> "That is not new matter the purpose of which is to show the alleged cause of action never did exist, and that material allegations of the complaint are not true."
>
> *Bancroft's Code Pleadings,* Sec. 265.

> "The new matter of the codes admits that all the material allegations of the complaint or petition are true, and consists of facts not alleged therein which destroy the right of action, and defeat a recovery."
>
> *Pomeroy's Code Remedies* (5th ed.) Sec. 548.

C. Assuming, arguendo, that the answers contained new matter and that the Alaska Code of Civil Procedure governed, no replies to the answers were required because the defense containing the so-called new matter was not separately stated and thus was improperly pleaded. A part of Sec. 55-5-52 A.C.L.A. 1949 provides:

> "The defendant may set forth by answer as many defenses and counter-claims as he may have. They shall be separately stated and refer to the causes of action which they are intended to answer in such manner that they may be intelligibly distinguished; provided that the defendant shall not be required to admit in his answer any liability or indebtedness to the plaintiff in order to be permitted to plead a counterclaim."

THERE WAS NO VARIANCE BETWEEN THE PLEADINGS AND THE PROOF, AS ALLEGED BY APPELLANTS. ALL ISSUES WERE FULLY AND FAIRLY TRIED, AND APPELLANTS WERE NEITHER SURPRISED NOR MISLED.

Appellants contend that appellee committed a material variance and failed in her proof by changing the theory of the case from that framed by the pleadings. The contention is that a variance occurred when the court admitted evidence to show that there was a sale before April 30th, and when the court admitted evidence to show that defendants prevented appellee and her representative from dealing with the buyer, Pickering. (Appellants' Brief, 25.) The pleadings, it is said, merely raise one issue of fact and that is as to whether the plaintiff was instrumental in procuring a buyer. Ibid.

A. The Federal Rules of Civil Procedure were in effect in the District Court for the District of Alaska before this trial commenced. Those rules deal specifically with the subjects of variance and amendment of pleadings to conform with proof. Rules 8(f) and 15(b) are pertinent. Respectively, they provide:

> "Construction of Pleadings. All pleadings shall be so construed as to do substantial justice."

> "Amendment to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to

> amend does not effect the result of the trial of these issues. If evidence is objected to at the trial on the grounds that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

The latter rule requires that objection be made to the admission of evidence which is not within the issues framed by the pleadings and, further, that the objecting party satisfy the court that such admission would prejudice him in maintaining his action. *Appellants failed to meet either requirement.* In *Globe Liquor Co., Inc. v. San Roman* (CCA 7th, 1947) 160 F.(2d) 800, as obiter dictum, the court said:

> "Of course, where on the trial evidence is admitted without objection which proves a case different from that alleged in the complaint, we may consider the pleadings amended to conform to the evidence thus introduced." Federal Rules of Civil Procedure, rule 15(b), 28 U.S.C.A. following Section 723c.

B. Assuming, arguendo, that the Alaska Code of Civil Procedure should govern any questions concerning variance, there is no error. Provisions of that

code require that objections to variances be made at the trial and that the trial court find that the objecting party is misled.

> "Variance. When material: Proof: Ordering Amendment: No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merit. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as shall be just." Sec. 55-5-71 A.C.L.A. 1949.

Sec. 55-5-81 A.C.L.A. 1949 is also pertinent.

> "Disregard of Defects. The court shall, in every stage of the action disregard any error or defect in the pleadings which shall not affect the substantial rights of the adverse party."

The interpretation of these provisions has been settled in Alaska for many years. *Black v. Teeter, et al.* 1 A. 561 (1902). In *Balabanoff v. Kellogg, et al.,* (CCA 9th, 1940) 118 F.(2d) 597, evidence was introduced and the cause was tried and submitted on a theory other than that framed by the pleadings. On appeal this court noted the similarity between the above quoted provision from the Alaska Code and Rule 15(b) of the Federal Rules of Civil Procedure. The court found no error. The Oregon courts have similarly construed the Oregon statute (Hills An-

notated Laws of Oregon, Sec. 96) from which the Alaska statute was taken verbatim, in *Hill v. Mellon,* 3 Ore. 542 (1870), and in *Stokes v. Brown,* 26 P. 561 (1891). In *Roberts v. Graham,* 6 Wall. 578 (1867) the court said:

> "The objection of variance not taken at the trial cannot avail the defendant as an error in the higher court, if it could have been obviated in the court below; * * *
>
> "In the case before us the plaintiff was entitled to be apprised of the objection if it were intended to be relied upon, at an earlier period in the progress of the trial. The court would doubtless have permitted an amendment if deemed necessary, upon such terms as the interests of justice seem to require."

The defendant's right to make the objection was waived and concluded by the delay.

C. The evidence which tended to show that the sale to Pickering occurred before April 30 was not outside the issues framed by the pleadings, because the "Authorization to Sell" was made an exhibit to the complaint and it provided that, "any change in the price or terms agreed to by me, or in case a sale is made by owner while this agreement is in effect, shall work no forfeiture in the commission due said agent in sale or transfer of said property". (R 6.) Rule 10(c) of the Federal Rules of Civil Procedure provides:

> "A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes".

The evidence which tended to show that appellants prevented plaintiff from dealing with the buyer, Pickering, was also admissible under the issues framed by the pleadings, tried and submitted.

THE TRIAL COURT ACCURATELY AND CLEARLY INSTRUCTED THE JURY ON THE LAW, AND THE INSTRUCTIONS AS A WHOLE FULLY AND FAIRLY PRESENTED THE ISSUES TO THE JURY.

The appellants submitted a number of requested instructions, twelve in all, but took no exception to the failure of the trial court to give any of the requested instructions. (R 22-28.) Counsel for appellants assisted the court in straightening out the language of the instructions, and made formal objection only to a portion of one instruction. (R 221-222.)

The portion of the instruction which the appellants found objectionable was as follows:

> "You are also instructed that if you find that the plaintiff would have negotiated with said Pickering but for the acts or conduct, if any, of defendant Lawrence A. White, then plaintiff would be entitled to the commission even though there was no sale of the property until after April 30, 1949, so long as it was sold within 60 days after that date."

This language must, of course, be considered in connection with the balance of the instructions, and particularly in connection with the balance of instruction No. 4, of which it was only a part. The appellants argue in their brief that "the authorization

does not justify such instructions", because appellee never at any time negotiated with Pickering. (Appellants' Brief, 34.)

The only objections made at the trial were:

"(1) That is not the law; and

(2) That there is insufficient evidence to warrant such an instruction." (R 222.)

Admittedly, neither appellee nor Rentschler ever dealt with the ultimate buyer, Pickering, during the life of the agreement. However, the reason why there were no such negotiations is apparent from the record: *appellee and Rentschler were expressly directed by appellant not to deal with Pickering or attempt to contact him in any way.* (R 71, 73, 80, 141, 153.)

True, this testimony and much other evidence was denied by the appellants, and certain explanations were made by the appellant Lawrence White and by the witness Pickering. The facts were fairly submitted to the jury, and the jury was under no obligation to believe either their testimony or the explanations. Questions of fact arising on disputed testimony must be deemed resolved in favor of the party obtaining verdict. *Lowden v. McClung* (CCA 8th, 1936) 80 F.(2d) 694. Appellee is entitled to have this court regard as true all competent evidence in the record most favorable to her, and to give her the benefit of every favorable inference reasonably drawn therefrom. *Colorado Life Co. v. Steele* (CCA 8th, 1939) 101 F.(2d) 483.

As the court properly instructed the jury, "* * * the law requires the utmost good faith on the part of the principal toward his agent. Each owes to the other the duty of performance according to the terms of their agreement." (R 32.) As the *Restatement* points out: "A principal has the right to control the conduct of the agent with respect to the matters entrusted to him" I *Restatement, Agency,* Sec. 14, p. 47. Furthermore,

> "(1) Unless otherwise agreed, an agent is subject to a duty to obey all reasonable directions in regard to the manner of performing a service that he has contracted to perform.
>
> "(2) Except where he is privileged to protect his own or other's interest, an agent is subject to a duty not to act in matters entrusted to him on account of the principal contrary to the directions of the principal, even though the terms of the employment prescribe that such directions shall not be given." II *Restatement,* Agency, Sec. 385, p. 859.

And, consider the following illustration given:

> "In consideration of $50.00 paid by A, P appoints A as his sole agent for a period of a month, to sell Blackacre on commission. Thereafter within the month, P directs A not to make statements concerning the qualities of Blackacre which are customarily made by honest real estate brokers. A is under a duty to P not to make such statements, but P is subject to liability for the breach of his implied agreement not to give unreasonable directions." Ibid.

The duty of appellant under the terms of the authorization to sell in this case, having given appellee the exclusive right to sell the property, was to refer all prospective purchasers to her. *Granata v. Mothner* (Tex. 1931) 44 S.W. (2d) 817, 819. Certainly, the appellant should not be permitted to avoid payment of a commission by definitely directing the broker not to take action which would have entitled the broker to a commission. Such was the effect of appellants' orders to the appellee in the present case.

The trial court gave a general charge to the jury, which fully covered all of the law involved in the proceedings. Considered as a whole, the instructions of the court fairly and substantially presented to the jury the issues to be decided, and the judgment should not be disturbed on appeal. *Goodyear Fabric Corp. v. Hirss* (CCA 1st, 1948) 169 F.(2d) 115; *Rowe v. Dixon* (Wash. 1948) 196 P.(2d) 327.

CONCLUSION.

The appellants and appellee entered into the contract concerned in this case voluntarily, lived under it, and should be required to abide by it. Appellants should not be permitted to avoid payment of appellee's commission by subterfuge, or by resort to artificial refinements and technicalities finding no support in the applicable law. The case was fairly tried

and submitted and the judgment below should be affirmed.

Dated, Anchorage, Alaska,
May 31, 1951.

Respectfully submitted,
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